United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1597

United States Court of Appeals

For the Second Circuit

WILLIAM W. MEED,

Plaintiff-Appellant,

—against—

LOUIS FRANK, as Police Commissioner of Nassau County (Successor to FRANCIS B. LOONEY, former Police Commisisoner of Nassau County), and THE NASSAU COUNTY POLICE DEPARTMENT,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

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Counter-Questions Presented

1. Is appellant's action barred by the statute of limitations?

   The Court below answered in the affirmative.

2. Is appellant's action barred because of *res adjudicata?*

   The Court below answered in the affirmative.

3. Is appellant's action barred because of collateral estoppel?

   The Court below did not pass on this question.

4. Did appellant reserve his rights in the New York State courts to re-litigate his Federal claims in the Federal courts?

   The Court below did not pass on this question.

5. Are the appellees proper "persons" in an action commenced pursuant to the Federal Civil Rights Act?

The Court below did not pass on this question.

Counter-Statement of the Case

Plaintiff-appellant (hereinafter referred to as "appellant") filed and served a complaint on September 4, 1973, upon the defendants-appellees (hereinafter referred to as appellees"), which allegedly seeks redress in the form of a request for a declaratory judgment for an alleged violation of his civil rights.

Prior to January 6, 1969, the appellant was a Nassau County police officer. On February 20, 1968 he was suspended from his duties as such police officer by reason of the fact that he was charged with carrying away merchandise consisting of two one-pound cans of coffee, a rubber bath mat and a package of sponge cloths from B. Altman & Company on February 15, 1968, without making payment for same and without the consent of the lawful owner. He was required by his superior officers to submit a written report, as prescribed by the Rules and Regulations of the Nassau County Police Department. Appellant took the position that because the acts relating to the occurrence at the B. Altman store were not performed while he was actually "on duty", he refused to give such written report. He was, therefore, charged, in addition to the unlawful taking of the merchandise, as aforementioned, with failing to obey the instructions and directions of a superior officer by refusing to submit a written report of his activities at said store. Appellant was thereupon tried at a disciplinary trial on June 5, 1968, pursuant to Section 8-13.0 of the Nassau County Administrative Code and Section 75(2) of the Civil Service Law of the State of New York, before

Deputy Chief Inspector Bert McConnell, acting as Trial Commissioner, who had been designated as such Trial Commissioner by Francis B. Looney, then the Nassau County Police Commissioner. After several postponements the trial was concluded, with decision reserved by the Trial Commissioner. Findings of fact and conclusions of law were submitted by said Trial Commissioner to the Police Commissioner, which indicated that the appellant was found guilty on all three charges. On January 6, 1969, appellant was duly notified, in writing, by the Nassau County Police Commissioner Francis B. Looney that the recommendation made by the Trial Commissioner was adopted by the Police Commissioner, and that appellant was thereupon dismissed from his position as a Nassau County policeman and his name dropped from the rolls of the Nassau County Police Department on the said 6th day of January, 1969.

Appellant then commenced a proceeding in the New York State Supreme Court, held in and for the County of Nassau, pursuant to Article 78 of the New York Civil Practice Law and Rules, claiming that his constitutional rights had been violated when he had been required to give a written statement; that the competent evidence before the Trial Commissioner did not establish his guilt; and further claiming that the sentence of dismissal imposed by the Nassau County Police Commissioner was excessive. The matter was heard in the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department. On March 9, 1970, a determination of the Police Commissioner in dismissing the appellant from his position as a Nassau County police officer was unanimously confirmed by said Appellate Division and the proceeding was dismissed on the merits.

Thereafter the appellant commenced a second proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules for a renewal of the previous Appellate Division determination, and the appellees at that time moved to dismiss said second application. By decision rendered during the October 1971 Term of the Appellate Division of the Supreme Court of the State of New York, appellant's motion was denied and the cross-motion to dismiss his said second Article 78 proceeding was granted. Appellant moved for leave to appeal to the Court of Appeals and his motion was denied by the said New York State Court of Appeals.

As previously stated, the appellant subsequently filed and served a complaint on September 4, 1973, upon the appellees, seeking redress in the form of a request for a declaratory judgment for an alleged violation of his civil rights. Appellees, by way of notice of motion, moved for an order pursuant to Rule 12(b) of the Federal Rules of Civil Procedure to dismiss the complaint of the appellant and granting judgment in favor of the appellees, on the following grounds:

(1) The action had not been timely instituted, as provided by Section 214(2) of the New York State Civil Practice Law and Rules.

(2) The Court lacked jurisdiction over the subject matter.

(3) The matter had been completely adjudicated on the same issues in the Supreme Court of the State of New York.

(4) There was a failure to state a claim upon which relief could be granted to appellant in his complaint.

Thereafter, on February 26, 1974, Judge Mark A. Costantino rendered a memorandum and order which granted appellees' motion to dismiss on the grounds of statute of limitations, and furthermore, the issues in the case have been fully litigated in the State courts and their decisions must be given *res judicata* effect. Appellant appealed to the United States Court of Appeals for the Second Circuit from an order dismissing the complaint and denying the cross-motion of the appellant, entered in this action on February 26, 1974, by way of notice of appeal dated March 28, 1974.

POINT I

Appellant's action is barred by the Statute of limitations.

Appellant is seeking a declaratory judgment asking the Court to declare that he was deprived of his constitutional rights in violation of 42 U.S. Code § 1983. Because a statute of limitations for actions commenced pursuant to the Civil Rights Act is not contained in either the Civil Rights Act itself or elsewhere in the Federal statutes, the applicable period of limitation is that which New York would enforce had an action seeking similar relief been brought in a court of that state. This is the language which was used in the case of *Swan* v. *Board of Higher Education of the City of New York*, 319 F.2d 56, 59 (2d Cir. 1963), where the court held as follows:

> "Because of a statute of limitations for actions of the present kind is not contained in either the Civil Rights Act itself or elsewhere in the federal statutes, the applicable period of limitation is that which New York would enforce had an action seek-

ing similar relief been brought in a court of that state. *O'Sullivan* v. *Felix*, 233 U.S. 318, 34 S. Ct. 596, 58 L. Ed. 980 (1914); *Hoffman* v. *Halden*, 268 F. 2d 280 (9 Cir. 1959); *Wilson* v. *Hinman*, 172 F. 2d 914 (10 Cir.), cert. denied, 336 U.S. 970, 69 S. Ct. 933, 93 L. Ed. 1121 (1949). This, of course, is the rule which prevails generally when Congress has not provided a statute of limitations for a federally-created cause of action. *Smith* v. *Cremins*, 308 F. 2d 187 (9 Cir. 1962); *Powell* v. *St. Louis Dairy Co.*, 276 F. 2d 464 (8 Cir. 1960); *Bertha Bldg. Corp.* v. *National Theatres Corp.*, 269 F. 2d 785 (2 Cir. 1959), cert. denied, 361 U. S. 960, 80 S. Ct. 585, 4 L. Ed. 2d 542 (1960)."

Section 214 (2) of the New York Civil Practice Law and Rules provides that an action to recover upon a liability created or imposed by statute shall be commenced within three years. In the case of *Ortiz* v. *LaVallee*, 442 F. 2d 912, 913-914 (2d Cir. 1971), in following *Swan* v. *Board of Higher Education*, *supra*, the court held as follows:

"Citing *Swan* v. *Board of Higher Education*, 319 F. 2d 56 (2d Cir. 1963), for the proposition that the applicable statute of limitations for a suit brought under the Civil Rights Act is that which the state courts would enforce in a comparable state action, the district court correctly ruled that the timeliness of appellant's complaint was governed by the three-year period of limitations prescribed by New York CPLR § 214(2) (McKinney's 1963) for 'an action to recover upon a liability * * * created or imposed by statute * * *.' See *id.*; *Romer* v. *Leary*, 425 F. 2d 186 (2d Cir. Apr.10, 1970). Accordingly the court held that since appellant's cause of action arose in

July, 1965 but the complaint was not filed until more than three years later, in August, 1969, his suit was barred."

The Court will note that in *Ortiz* v. *LaVallee, supra*, there was a question of the tolling of the statute of limitations by reason of the fact that the plaintiff in that case was confined to a prison. There is no claim by the appellant that he was at any time imprisoned since the date of his dismissal as a Nassau County police officer on January 6, 1969. His action should, therefore, have been commenced on or before January 6, 1972. While there is no date on the copy of the summons issued in this case, same was not served until September 11, 1973, and it was definitely issued by the District Court after January 6, 1972. Accordingly, since appellant's alleged cause of action allegedly arose on January 6, 1969, the complaint was not filed until more than three years later, in September 1973, and his suit is barred and his complaint should, therefore, be dismissed.

POINT II

Appellant's suit is barred because of *res judicata*.

The law is clear that the issues in this case have been fully litigated in the State courts and that their decisions must be given res judicata effect (A. 44 A)*. *Johnson* v. *Department of Water and Power*, 450 F. 2d 294 (9th Cir. 1971), *cert. den.*, 405 U.S. 1072 (1972); *Spampinato* v. *City of New York*, 311 F. 2d 439 (2d Cir. 1962), *cert. den.*, 372 U.S. 980 (1963), *reh. den.*, 374 U.S. 818 (1963); *Murray* v. *Oswald*, 333 F. Supp. 490 (S.D.N.Y. 1971).

* (A.) refers to the page numbers of the Appendix unless otherwise indicated.

The effort of appellant to avoid the effect of *res judicata* is frivolous. The principal issue of whether appellant received a fair hearing with full due process and other constitutional safeguards and protection was determined in *Meed* v. *Looney*, 34 A.D. 2d 620 (2d Dept. 1970), *reargued*, 37 A.D. 2d 847 (2d Dept. 1971). The complete reargued decision follows:

> "Renewed proceeding to review respondent's determination, dated January 6, 1969, which dismissed petitioner from his position as a patrolman in the Nassau County Police Department. Respondent has moved to dismiss the petition upon an objection in point of law.
>
> "Respondent's motion granted and renewed proceeding dismissed, without costs.
>
> "Petitioner's dismissal from his position was after a hearing and upon a charge that he had stolen certain items from B. Altman & Co. on February 15, 1968. The dismissal was confirmed by this court on March 9, 1970 (Matter of Meed v. Looney, 34 A.D. 2d 620, 309 N.Y.S.2d 571). Petitioner now seeks again to review that determination, on the ground of newly discovered evidence regarding the credibility of the principal complaining witness and upon the additional ground of lack of jurisdiction in that petitioner was not afforded a hearing before the Commissioner of Police of Nassau County.
>
> "In our opinion, both contentions raised by petitioner are without merit. The newly discovered evidence, including a motel registration card for the nights of January 14, 1968 and January 15, 1968 and an affidavit to the effect that petitioner's car was being repaired from February 3, 1968 to Feb-

ruary 12, 1968, was clearly available to petitioner at the time of the hearing. Neither should any evidence as to the complaining witness credibility, especially from neighbors, have been so late in forthcoming. In our opinion, petitioner has been guilty of gross laches in seeking the instant relief. Moreover, in our opinion, the newly discovered evidence would probably not have produced a different result.

"Petitioner further alleges that his hearing before a deputy chief inspector designated by the Commissioner, and not before the Commissioner himself, was in violation of the Nassau County Administrative Code. This contention is similarly without merit.

"Section 8-13.0 (par. b) of the Nassau County Administrative Code (L.1939, chs. 272) gives the Commissioner the unqualified right to designate a trial officer to hear charges against patrolmen and to report his findings and recommendations to the Commissioner for action. A hearing with full due process protection afforded petitioner was conducted by a deputy inspector who reported to the Commissioner. In our opinion the hearing tribunal as constituted complied with the Administrative Code of Nassau County and jurisdiction was present." 37 A.D.2d 847.

It is also clear that a municipal employer has a right to make inquiry of its employees as to matters affecting the fitness and suitability for public service. *Gardner* v. *Board of Public Works*, 341 U.S. 716 (1950). In addition, appellant's activities, whether on duty or off duty, are a legitimate subject for a disciplinary inquiry concerning conduct unbecoming an officer. *Jacob J. Parker* v. *Howard*

B. Levy, 42 L.W. 4949 (U.S. Sup. Ct. June 19, 1974); *Fletcher* v. *United States*, 28 Ct. Cl. 173 (1893). The constitutional question having been raised by the appellant in the State courts and the determination of the State courts having had before them said constitutional question on whether appellant was afforded due process and a fair disciplinary hearing, constitutes *res judicata*, and this Court is bound thereby.

The case of *Dwen* v. *Barry*, 336 F. Supp. 487 (1971), *rev'd and remanded*, 483 F. 2d 1126 (2d Cir. 1973) remand decided ...., F. Supp. ..... 1974, by memorandum decision and order dated May 30, 1974, U.S.D.J. Jacob Mishler, is clearly distinguishable from the case at bar. While it is true that this Court concluded that the Suffolk County Police Department is not a para-military organization, there is little similarity between the disciplinary questions in the *Dwen* case with the case at bar. The instant case is akin to *People ex rel. Masterson* v. *French*, 110 N.Y. 494 (1888), which was concerned with the propriety of the dismissal of a patrolman from the force for malfeasance, or appearing on duty while intoxicated. See *Dwen*, *supra*, at 1128-9 (particularly foot note 6 at page 1129 and foot note 2 at page 1128).

POINT III

Appellant's suit is further barred because of collateral estoppel.

The law is clear that even if the second action, which is in the nature of a declaratory judgment action, is not upon the same cause of action as the initial actions, which were in the nature of Article 78 proceedings in the State courts, the original judgment is nonetheless *res judicata*

if an issue determined in the first suit is sought to be relitigated in the second. In this situation, the parties are said to be collaterally estopped from relitigating the same issues. *Schuylkill Fuel Corp.* v. *B.&C. Nieberg Realty Corp.*, 250 N.Y. 304, 307 (1929).

The distinctions between direct estoppel (*res judicata*) and collateral estoppel are extremely significant. If the second litigation is upon the same cause of action as the first so that the doctrine of direct estoppel is applicable, the prior determination is *res judicata* as to every material issue of law or fact actually litigated in the action, but also as to any such issue which might have been litigated. On the other hand, where the causes of action are different, the doctrine of collateral estoppel prevents relitigation only to material issues of fact or law which were actually litigated and determined by the prior judgment. It does not work an estoppel as to matters which might have been litigated but were not. See *Schuylkill, supra.*

As we stated in *Ashe* v. *Swenson*, 397 U.S. 436, 25 L.Ed. 2d 469, 90 S. Ct. 1189, the Supreme Court enunciated clearly the doctrine of collateral estoppel with the following definition:

> " 'Collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that *when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.*" (Emphasis supplied)

Assuming, *arguendo*, that a judgment for the appellees in the State action is not *res judicata* in the Federal action; nevertheless, such judgment would foreclose relitigation

in the federal action of many of the issues common to both on the basis of collateral estoppel. *Glaser* v. *Connell*, 266 F. 2d 149 (9th Cir. 1959); *Connelly* v. *Balkwill*, 174 F. Supp. 49 (E.D.O. 1959).

Appellant vainly attempts to resurrect an argument that his due process rights were violated, because he alleges that there were no findings of fact and conclusions of law. However, these issues and their constitutional ramifications were clearly and decisively disposed of in the State appellate courts. Mr. Louis Schultz, Senior Deputy County Attorney, in his affidavit in support of the motion to dismiss (A. 24A [¶ 12] and A. 25A [¶¶ 14, 15]) set this erroneous contention to rest.

This Court is bound, under the doctrine of collateral estoppel, to accept as true any material facts necessarily found by the State courts.

Such was the finding made in the case of *Taylor* v. *New York City Transit Authority*, 309 F. Supp. 785, 790 (E.D. N.Y. 1970). In the *Taylor* case, *supra*, the plaintiff had been dismissed from public employment by the New York City Transit Authority after a disciplinary proceeding. Daniel T. Scannell, who had been the attorney for said Transit Authority when the disciplinary proceeding and the departmental hearing had been instituted, was appointed a member of the Transit Authority subsequent thereto and voted to approve the Referee's report and ordered the dismissal of the plaintiff in that case. An appeal was taken by the plaintiff to the Civil Service Commission because of a conflict of interest and said Commission affirmed the dismissal. On appeal to the Supreme Court, Appellate Division, the dismissal was unanimously affirmed, at which time that Court found that that plaintiff knew or should have known of the conflict at the time of

his appeal to the Civil Service Commission, and the Appellate Division further relied on the additional grounds of statute of limitations and laches. The decision in that case was reported in 25 A.D. 2d 682 (1966), and was thereafter unanimously affirmed by the New York State Court of Appeals in 19 N.Y. 2d 724 (1967). Plaintiff brought his suit pursuant to 42 U.S. Code § 1983 and its companion jurisdictional provision, 28 U.S. Code § 1343, on the theory that plaintiff's employment was terminated without due process by State officials acting under color of State law. The Court, in *Taylor* v. *New York City Transit Authority*, *supra*, on page 792, further held as follows:

> "No compelling federal interest militates against according res judicata effect to the determinations of the Commission. Federal courts are not granted exclusive jurisdiction to enforce constitutional rights. *Compare Lyons* v. *Westinghouse Electric Corp.*, 222 F.2d 184 (2d Cir.), cert. denied, 350 U.S. 825, 76 S. Ct. 52, 100 L.Ed. 737 (1955), where the grant to the federal courts of exclusive jurisdiction was said to preclude giving res judicata effect to a state decision, *and Mercoid Corp.* v. *Mid-Continent Co.*, 320 U.S. 661, 670, 64 S.Ct. 268, 88 L. Ed. 376 (1943), where full enforcement of res judicata concepts might have allowed violation of the anti-trust laws. So long as the state provides a reasonable means of asserting and vindicating federal constitutional rights and so long as this means results in defensible adjudications, the federal courts should grant them full faith and credit. 28 U.S.C. §§ 1738, 1739; *Angel* v. *Bullington*, 330 U.S. 183, 67 S. Ct. 657, 91 L. Ed. 832 (1947). *See generally*, Note, Res Judicata: Exclusive Federal Jurisdiction and

the Effect of Prior State-Court Determinations, 53 Va. L. Rev. 1360 (1967).

> "The states have a strong interest in creating administrative tribunals and in insuring finality for their determinations, subject to such judicial review as may be constitutionally required. They have a preeminent interest in the regulation and discipline of their own employees. *Slochower* v. *Board of Higher Education*, 350 U.S. 551 559, 76 S. Ct. 637, 641, 100 L.Ed. 692 (1956) ('State has broad powers in the selection and discharge of its employees * * *'); *cf. People of the State of New York* v. *Davis*, 411 F. 2d 750, 755 (2d Cir. 1969) (removal case; 'basic responsibility * * * remains with the states'). The comprehensive New York system for disciplining governmental employees might be seriously shaken were collateral attacks to be permitted in federal courts and were we to fail to give res judicata effects to judicial and quasi-judicial determinations adverse to employee."

The decision of Judge Weinstein in *Taylor* v. *New York City Transit Authority*, *supra*, was unanimously affirmed in 433 F. 2d 665 (2d Cir. 1970) and agreed that *res judicata* was a proper determination given in said case. It further held, at 433 F. 2d 671 (2d Cir. 1970):

> "On the other hand, we do not perceive a compelling federal interest to be vindicated which would necessitate overriding clearly strong New York state interests with regard to the finality of state agency decisions and the regulation of state employee behavior, within judicially supervised constitutional limits, of course. To allow collateral attacks on these interests in a federal forum would be to de-

liver unnecessary and potentially debilitating blows to legitimate areas of State responsibility."

POINT IV

Appellant's unrestricted, unreserved, voluntary and fully litigated attack in the New York State courts precludes him from now relitigating the same issues in the Federal courts.

The Supreme Court of the United States, in *England* v. *Louisiana Medical Examiners*, 375 U.S. 411, 11 L. Ed. 2d 440, 84 S. Ct. 461 (1964), enunciated the rule of law that appellant must reserve his rights in the State courts in order to relitigate his Federal claims in the Federal courts. The Court stated, at 375 U.S. 419:

> "[W]e see no reason why a party, after unreservedly litigating his federal claims in the state courts although not required to do so, should be allowed to ignore the adverse state decision and start all over again in the District Court. Such a rule would not only countenance an unnecessary increase in the length and cost of the litigation; it would also be a potential source of friction between the state and federal judiciaries. We implicitly rejected such a rule in Button, when we stated that a party elects to forgo his right to return to the District Court by a decision "to seek a complete and final adjudication of his rights in the state courts." We now explicitly hold that if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has

> them decided there, then—whether or not he seeks direct review of the state decision in this Court—he has elected to forgo his right to return to the District Court."

It is clear, therefore, that appellant must inform the State court what his Federal claims are so that the State court may construe those claims accordingly. Moreover, the *England* case insists that any reservation as to the disposition of Federal constitutional claims must be made on the State court record. 375 U.S. at 421. Also see *Lecci* v. *Cahn*, 493 F.2d 826 (2d Cir. 1974).

It is also clear that in order for *England* to apply, it is not necessary for the litigation to have commenced first in the Federal court. The clear intent of this case is not based on where one institutes the action first, but when a litigant does commence the action, that he reserve his rights accordingly. As was stated in *Lecci* v. *Cahn*, at page 830, "The policy underlying the *England* decision is the avoidance of 'a potential source of friction between the state and federal judiciaries.' 375 U.S. at 419, 84 S. Ct. at 466. The procedure employed here does nothing but exacerbate that relationship."

POINT V

Appellees are not proper "persons" in an action commenced pursuant to Federal Civil Rights Act.

One of the appellees in this action is the Nassau County Police Department. The other appellee is Louis Frank, as Police Commissioner of Nassau County. It is, therefore, apparent that appellant's complaint is predicated upon the

actions of the Nassau County Police Department and not by any individual act of Louis Frank.

Following the decision rendered by the Supreme Court of the United States in *Monroe* v. *Pape*, 365 U.S. 167, 191 (1961), there is nothing to suggest that the generic word "person" in 42 U.S. § 1983 was intended to have an application to a Police Department. Such was the ruling by the Supreme Court of the United States in *City of Kenosha* v. *Bruno*, 37 L. Ed. 2d 109, 116 (1973), where the Court held as follows:

> "We find nothing in the legislative history discussed in Monroe, or in the language actually used by Congress, to suggest that the generic word 'person' in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them. Since, as the Court held in Monroe, 'Congress did not undertake to bring municipal corporations within the ambit of' § 1983, 365 U.S. at 187, 5 L. Ed 2d 492, they are outside of its ambit for purposes of equitable relief as well as for damages. The District Court was therefore wrong in concluding that it had jurisdiction of appellees' complaints under § 1343."

The same ruling was made on *Gonzalez* v. *Doe*, 476 F. 2d 680 (2d Cir. 1973), where it was held that an action against the City of Hartford could not be prosecuted in an action commenced pursuant to 42 U.S. Code § 1983 because the Court, in dismissing the action against the City of Hartford held, at page 681, that the City was not a "person" within the meaning of 42 U.S. Code § 1983 and that, therefore, it may not be sued thereunder.

CONCLUSION

The judgment of the lower Court should be affirmed.

Respectfully submitted,

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Brief

IS HEREBY ADMITTED

THIS 10th DAY OF July 197 4

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